Malayan Flour Mills Bhd v Saw Eng Chee (the administrator of the estate of Saw Cheng Chor, the deceased) & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A–02–488 OF 1996
SHAIK DAUD, MOKHTAR SIDIN AND DENIS ONG JJCA
9 APRIL 2001

***Contract** — Formation — Whether telex constituted complete agreement — Letter of offer by telex — Negotiation fell through — Whether negotiation affected telex offer — Telex offer was only invitation to treat — Whether terms of offer must be complied to constitute valid contract*

The first and second respondent were respectively the administrator and executor of the estate of Saw Eng Chor and Saw Eng Cheong (both deceased). The deceased were the co-proprietors of a piece of land ('the land'). Adjoining to the land was a piece of land occupied by the appellant. On 12 January 1979, the appellant received an offer by way of a telex from the solicitors of the deceased for the sale of the land. The appellant did nothing to this offer until 15 January 1979, ie the last day for the appellant to accept the offer. On that day the parties discussed the sale of the land and after negotiation, the parties drew up a formal letter of offer. However, the letter of offer was never signed. The appellant then reverted to the original offer in the telex and accepted the offer contained in that telex. The appellant claimed that the deceased had refused to complete the agreement by refusing to execute and return the draft agreement. The appellant filed an action against the respondents for specific performance of the sale and purchase agreement. The basis of the appellant's claim was on the purported draft agreement. The respondents had taken the position that there was no concluded agreement between the parties in respect of the sale of the land. The trial court held that there was no valid contract between the parties upon which the appellant could claim for. The appellant appealed.

Held, dismissing the appeal:

(1) The appellant's claim should be dismissed because it was clear that there was no concluded agreement. Even if there was a draft agreement where the parties had agreed to the terms, the draft agreement was never produced to enable the court to determine whether there was a concluded contract (see pp 75I–76A).

(2) The renegotiation did not affect the telex offer. The renegotiation fell through and there was no fresh offer from the respondents. The appellant had every right to fall back on the telex offer. It was clear that the appellant accepted all the terms and conditions contained in the telex offer. With that acceptance there was a valid offer and acceptance between the parties (see p 76B–D).

(3) The telex offer was nothing but an invitation to treat in view of the conditions imposed. Acceptance by the appellant did not constitute a valid contract. In addition to accepting the offer before the deadline, the appellant must fulfil the terms and conditions stipulated in the telex offer. From the evidence, the appellant failed to fulfil all the conditions imposed even though in their acceptance letter they accepted all the conditions. For that reason, the respondents had every right to treat that there was no valid contract between the parties when the appellant failed to fulfil the conditions in the telex offer (see pp 76E–F, 77F–G).

[**Bahasa Malaysia summary**

Responden pertama dan kedua masing-masing merupakan pentadbir dan wasi harta pesaka Saw Eng Chor dan Saw Eng Cheong (si mati). Si mati-si mati ialah pemilik bersama sebidang tanah ('tanah tersebut'). Bersebelahan tanah tersebut adalah sebidang tanah yang dihuni oleh perayu. Pada 12 Januari 1979, perayu menerima satu tawaran melalui teleks dari peguamcara-peguamcara si mati bagi jualan tanah tersebut. Perayu tidak berbuat apa-apa terhadap tawaran ini sehingga 15 Januari 1979, iaitu hari terakhir bagi perayu menerima tawaran tersebut. Pada hari tersebut, pihak-pihak membincangkan jualan tanah tersebut dan selepas perundingan, pihak-pihak menggubal suatu surat tawaran rasmi. Walau bagaimanapun, surat tawaran tersebut tidak pernah ditandatangani. Perayu kemudiannya merujuk semula tawaran asal di dalam teleks dan menerima tawaran yang terkandung dalam teleks tersebut. Perayu menuntut bahawa si mati enggan menyempurnakan perjanjian tersebut dengan enggan melaksanakan dan memulangkan draf perjanjian tersebut. Perayu memfailkan satu tindakan terhadap responden-responden untuk pelaksanaan khusus perjanjian jualbeli tersebut. Asas tuntutan perayu adalah draf perjanjian yang dikatakan tersebut. Responden-responden memberikan hujahan bahawa tiada terdapat perjanjian yang diselesaikan di antara pihak-pihak berkenaan jualan tanah tersebut. Mahkamah perbicaraan memutuskan bahawa tidak terdapat kontrak yang sah di antara pihak-pihak yang boleh dijadikan tuntutan perayu. Perayu tersebut merayu.

Diputuskan, menolak rayuan tersebut:

(1) Tuntutan perayu patut ditolak kerana ia jelas bahawa terdapat tiada perjanjian yang disempurnakan. Jika terdapat pun draf perjanjian di mana pihak-pihak telah bersetuju dengan terma-termanya, draf perjanjian tersebut tidak pernah dikemukakan di hadapan mahkamah untuk membolehkan mahkamah memutuskan sama ada terdapatnya kontrak yang sempurna (lihat ms 75I–76A).

(2) Perundingan semula itu tidak menjejaskan tawaran teleks tersebut. Perundingan semula tersebut gagal dan tiada tawaran

baru dibuat oleh responden-responden. Perayu berhak bergantung kepada tawaran teleks tersebut. Ia jelas bahawa perayu telah menerima segala terma dan syarat yang terkandung dalam tawaran teleks tersebut. Dengan penerimaan tersebut, wujudnya tawaran dan penerimaan yang sah di antara pihak-pihak (lihat ms 76B–D).

(3) Tawaran teleks tersebut cuma satu pelawaan tawaran memandangkan syarat-syarat yang dikenakan. Penerimaan oleh perayu tidak mewujudkan satu kontrak yang sah. Selain dari menerima tawaran tersebut sebelum tempoh tamat, perayu mestilah memenuhi terma-terma dan syarat-syarat yang terkandung dalam tawaran teleks tersebut. Dari keterangan yang diberikan, perayu gagal memenuhi semua syarat yang dikenakan walaupun dalam surat penerimaannya, beliau menerima segala syarat tersebut. Oleh kerana itu, responden-responden berhak menganggap bahawa tidak wujudnya satu kontrak yang sah di antara pihak-pihak kerana perayu gagal memenuhi syarat-syarat dalam tawaran teleks tersebut (lihat ms 76E–F, 77F–G).]

[Editorial note: The appellant's (Malayan Flour Mills Bhd) application to the Federal Court vide Civil Application No 08–26–2001(A) for leave to appeal was denied.]

Notes

For cases on formation of contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2719–2807.

Appeal from: Civil Suit No 289 of 1983 (High Court, Ipoh)

SS Muker (*P Menon* and *Steven Puung* with him) (*Isharidah, Ho, Chong & Menon*) for the appellant.

S Theivanthiran (*Reena Kaura* with him) (*Thevin Chandran & Wong*) for the respondents.

Mokhtar Sidin JCA (delivering judgment of the court):**.** In this appeal, the appellant, a limited company, filed an action against the two respondents for specific performance of a purported sale and purchase agreement. The first respondent is Saw Eng Chee, the administrator of the estate of Saw Cheng Chor and the second respondent, Quah Siew Yaong @ Guah Siew Yong and Saw Lip Peng @ Saw An Peng, the executors of the estate of Saw Eng Cheong.

Saw Eng Chor and Saw Eng Cheong (both deceased) were brothers. They were the co-proprietors of a piece of land held under State Lease No 680 Lot 5020, Mukim of Lumut ('the said land') comprising an area of some six acres. It has a sea frontage and a jetty. Adjoining the said land was a piece of land occupied by the appellant. It is common ground that the appellant was desirous in acquiring the said land. The deceased also owned three pieces of land (a total area of about 14 acres) adjoining the said land ('the other three pieces of land'). Sometime in 1978, the deceased, Saw Eng

Cheong, offered to sell the said land to the appellant at the price of RM50,000 per acre. The offer was made to one Teh Liang Teik, the managing director of the appellant. For some reasons best known to the parties the sale did not go through. At the end of 1978, the deceased, Saw Eng Chor, offered to sell the said land to the appellant for the sum of RM350,000 and the other three pieces of land for an additional sum of RM120,000. Again the transaction failed to materialize. On 12 January 1979, Teh Liang Teik received an offer by way of a telex from Messrs Ngan & Tan for the sale of the said land. The telex reads as follows:

> 1 We confirm our clients Saw Eng Cheong and Saw Cheng Chor's offer to sell you State Lease No 680 Lot 5020 Mukim Lumut in area six acres, upon the following conditions:
> (i) Total price is RM350,000 payable within one month as follows:
> (a) RM 250,000 cash
> (b) RM 100,000 shares in Dindings and Feedmill Sdn Bhd.
>
> 2 Permanent right of way of 66 feet width parallel to sea frontage to be granted to Ban Joo Seng Chan Sdn Bhd.
>
> Confirm if you accept this offer on or before 15 January 1979.

The appellant did nothing to this offer until the 15 January, ie the last day for the appellant to accept the offer. On that day, Teh Liang Teik, Lee Soon Lee (another director of the appellant) and Mr Tang Khai Kit (the solicitor for the appellant) went to see Saw Cheng Chor at the latter's office in Sitiawan. In that office the parties discussed the sale of the said land and the other three pieces of land which were offered to the appellant at the end of 1978. From the evidence, the price offered for the three lots was RM120,000, thus making the total sale price of RM470,000 for the said four pieces of land.

After the parties met and negotiated for the sale and purchase of the properties, Mr Tang Khai Kit and Saw Eng Chee (Saw Eng Chor's son) went over to the office of Messrs Ngan & Tan, which was across the road to draw up a formal offer in respect of the sale and purchase of those properties. At the office of Messrs Ngan & Tan, one Ms Cheng Hong Eng, the solicitor acting for Saw Cheng Chor, prepared a letter of offer from the respondents which was produced in evidence and reads:

> Ms Malayan Flour Mills Bhd
> Chartered Bank Building
> 9th Floor, Jalan Ampang
> Kuala Lumpur.
>
> Dear Sirs,
>
> Re: Disposal of land held under:
> (1) State Lease No 680 Lot 5020 in area 6a 0r 00p;
> (2) QT(R) Dgs 234/71 Lot 5342 in area 4.2372 acres;
> (3) QT(R) Dgs 233/71 Lot 5341 in area 6.6639 acres;
> (4) QT(R) Dgs 232/71 Lot 5340 in area 3.7116 acres
>
> We act for Messrs Saw Cheng Chor and Saw Eng Cheong both of No 17, Lumut Road, Sitiawan, Perak.

We confirm that our clients are the registered owners of the above mentioned land itemized (1). We further confirm our clients are the only partners in the firm known as SYARIKAT BAN JOO SENG CHAN which said firm is the registered owner of the above mentioned land itemized (2), (3) and (4). Our clients instruct us to state that they hereby offer to dispose off the same to you together with the buildings and infra-structures thereon and the jetty abutting therefrom ('the said land') subject to and upon the terms and conditions hereinafter contained:

1 The total consideration is RM470,000, which shall be paid as to a sum of RM170,000 by cash and as to the balance thereof of RM300,000 in the form of shares in your subsidiary Company Dindings Soya and Multifeeds Sdn Bhd to be issued in our clients' names or their nominees. The said sum of RM170,000 is compensation payment to our clients for the development costs incurred by them in relation to the said land. And the sum of RM300,000 is our clients' contribution towards the investment costs in and for Dindings Soya and Multifeeds Sdn Bhd.

2 The said land is disposed with vacant possession and free from all encumbrances subject however to all conditions of title express or implied and restriction-in-interest.

3 The total consideration of RM470,000 shall be paid at the times and in the manner following:

(i) a sum of RM170,000 in cash on the date of execution of the formal Agreement; and

(ii) the share certificates for RM300,000 shares in Dindings Soya and Multifeeds Sdn Bhd with our clients' names or that of their nominee(s) registered therein as the shareholders ('the said Share Certificate') shall be deposited with us within six (6) months from date of execution of the formal Agreement failing which our clients shall be entitled to specific performance.

4 The said sum of RM170,000 paid by you after deducting the estimated amount of real property gains tax payable by our clients shall be released to our clients after we have received written confirmation from you or your Solicitors, Ms Joseph Tan & Tang of No 33C, Jalan Bandar Raya, Ipoh of the receipt of the following documents:

(1) the title deeds to the said land;

(2) valid and registrable memoranda of transfer duly executed by our clients in favour of Dindings Soya and Multifeeds Sdn Bhd; and

(3) the relevant stamp duty proforma.

5 Our clients undertake that within fourteen (14) days after receipt of the said sum of RM170,000 from you by us, they shall execute a valid and registrable memoranda of transfer in respect of the said land and deliver the same together with the title deeds thereto to you or your solicitors.

6 Our clients agree to execute and do all such acts, documents and things as may be reasonably necessary to support any application by you to have the said land registered or vested in your name. The costs of such application to be borne by you.

7 Our clients will give vacant and peaceful possession of the said land to you within fourteen (14) days after you have paid the sum of RM170,000 to us.

8 All quit rent assessment rates and taxes and other outgoings together with all profits or rent in respect of the said land shall be apportioned as at the date of delivery of vacant possession.

9 Within one (1) month after execution of the normal Agreement our clients will notify you in writing the particulars of the nominees who are to receive the said shares. In the absence of such written notification, you are at liberty to issue the said shares to our clients in equal proportions.

10 The formal Agreement shall be executed between you and our clients within fourteen (14) days from date of acceptance of this offer.

If you accept our clients' offer as stated herein, kindly sign and return to us the said copy of this letter together with a cheque for RM47,000 representing a deposit of 10% of the total consideration.

Yours faithfully.

By lunch time, Saw Cheng Chor and the others gathered at the office of Ngan & Tan. Ms Cheng Hong Eng then read the letter to Saw Cheng Chor. By the time she finished reading the letter, the said Saw Cheng Chor changed his mind. He instructed his solicitor not to sign the said letter and the reason for doing so was that he needed time to reconsider. Though the letter was produced in evidence it was never signed. In our view, this proposed letter of offer should not have been brought into evidence at all.

For all intents and purposes, the offer contained in the letter never materialized and it is treated as never coming into being. When Saw Cheng Chor advised his solicitor not to sign the said offer. Tang Khai Kit, on the advice of his solicitor, reverted to the original offer in the telex and accepted the offer contained in that telex on behalf of the plaintiff. To signify their acceptance the plaintiff instructed a staff of Messrs Ngan & Tan to prepare an acceptance letter and signed the letter on the same date, ie 15 January 1979. The letter of acceptance reads:

We refer to your telex dated 12 January 1979.

We hereby confirm acceptance of your client's offer to sell the above-stated land as per the conditions set out in your said telex.

We enclose herewith as earnest money our cheque for the sum of RM47,000.

Kindly sign and return to us the second copy of this letter by way of acknowledgement of receipt of this letter and the cheque.

The receipt of the letter and the cheque were acknowledged by Messrs Ngan & Tan. A receipt for the cheque was issued by Messrs Ngan & Tan which reads as follows:

Payment to our account as stakeholders in respect of the disposal of State Lease 680 by our clients Saw Cheng Chor and Saw Eng Cheong.

It is clear to us that the acceptance by the plaintiff was in respect of the offer contained in the telex.

The appellant amended their statement of claim on 2 January 1988. In this amended statement of claim it is deal to us that the basis of the appellant's claim is on a purported draft agreement as found in paras 5 to 10 which read:

5 It was then agreed between the parties concerned that the terms in the said telex be held in abeyance pending the drawing up of a formal agreement for the sale and purchase of the said Land ('the said agreement').

6 A draft of the said agreement was drawn up and sent to the said solicitors for their approval on 2 February 1979.

7 On or about the first week of March 1979, the plaintiff was informed that the amended agreement has been forwarded to the defendants by the solicitors for their execution.

8 On or about 25 April 1979, the said solicitors forwarded the re-amended agreement for the defendants' execution and return.

9 Notwithstanding repeated requests by the plaintiff the defendants have wilfully refused to return the said agreement or taken any steps towards the completion of the said agreement.

10 By reason of the defendant's wrongful refusal and omission to complete the said agreement, the plaintiff has suffered damage.

The respondents' reply to this is found in paras 4 to 6 of the amended statement of defence which reads:

4 The first defendant further avers that the plaintiff instead of confirming their acceptance of the offer contained in the said telex of 12 January 1979 (re-negotiated) with the first defendant on 15 January 1979 for the purchase of three additional lots of properties known as QT(R) Dgs 234/71 Lot 5342, QT(R) Dgs 233/71 Lot 5341 and QT 232/71 Lot 5340 the terms and conditions whereof are as set out in an unsigned letter drawn up by Messrs Ngan & Tan dated 15 January 1979. The first defendant avers that the re-negotiations constituted a counter-offer which was never accepted by the defendants. Further, upon the counter-offer being rejected by the first defendant, the plaintiff purportedly accepted the original offer containing in the said telex by issuing a letter dated 15 January 1979 addressed to Messrs Ngan & Tan and tendering a cheque for RM47,000 being payment of earnest money. At the material time, Messrs Ngan & Tan had no authority to acknowledge the plaintiff's purported acceptance.

...

6 As for para 6, the first defendant avers that the plaintiff having re-negotiated with the first defendant aforesaid had in effect rejected the original offer contained in the said telex thereby rendering the plaintiff's solicitors' letter dated 2 February 1979 self-serving.

From the above it could be seen that both parties were referring to a draft agreement which was never executed. It is significant to note that this draft agreement was never produced in court. Since the basis of the appellant's claim was on the draft agreement, in our view the burden was on the appellant to produce the draft agreement. The respondents had taken the position that there was no concluded agreement between the parties in respect of the sale of the said land.

With the greatest respect to the learned counsel for the appellant, the claim by the appellant based on the amended statement of claim should be dismissed because it is clear to us there was no concluded agreement. Even

if there was a draft agreement where the parties had agreed to the terms (which was denied by the respondents), the draft agreement was never produced to enable this court and the court below to determine whether there was a concluded contract where the disagreements between the parties were so minor and insignificant.

After perusing the evidence adduced in court, it is clear to us that the basis of the contract was on the telex offer dated 12 January 1979 and the acceptance by the appellant in the letter dated 15 January 1979. Though it was contended by the learned counsel for the respondents that the telex offer had lapsed due to the renegotiation between the parties on 15 January 1979, it is clear to us that was not so. In our view, the renegotiation did not affect the telex offer. The telex offer was there all the time, unless the parties agreed the offer that came up during the renegotiation superseded the telex offer. That was not so in the present appeal. As far as we are concerned, the renegotiation fell through and there was no fresh offer from the respondents. In our view, the appellant had every right to fall back on the telex offer dated 12 January 1979. The appellant did right to accept the telex offer before the deadline. It is clear from the acceptance letter dated 15 January 1979, that the appellant accepted all the terms and conditions contained in the telex offer. We were of the opinion that with that acceptance there was a valid offer and acceptance between the parties.

The claim by the appellant in the present appeal is for specific performance or in the alternative, for damages. In order to succeed in their claim, the appellant must satisfy this court that there was a valid contract between the parties. To us, the telex offer was nothing more than an invitation to treat in view of the conditions imposed. In the present appeal, acceptance by the appellant did not constitute a valid contract. In order to constitute a valid contract, in addition to accepting the offer before the deadline, the appellant must fulfil the terms and conditions stipulated in the telex offer. The telex imposed three conditions to be fulfilled by the appellant, namely:

(a) Cash of RM250,000 to be paid within one month.

(b) RM100,000 worth of shares in Dindings and Feedmill Sdn Bhd within a month.

(c) Permanent right of way of 66 ft wide parallel to sea frontage to be granted to Ban Joo Seng Chan Sdn Bhd.

As to the first condition, it is clear to us that the appellant paid RM47,000 when the appellant accepted the offer on 15 January 1979. The appellant called this earnest money. Whatever the term used, we will treat that money as part of the payment to be in cash. With that payment, the appellant had to pay the balance of RM203,000 in cash on or before 15 February 1979 as stipulated in the telex offer dated 12 January 1979. It is clear from the evidence that the appellant failed to pay the balance on or before the due date. In fact, no evidence was led to show that the appellant had attempted to pay the balance within the stipulated time. There was also no evidence to show that the appellant had written to the respondents for extension of time

to pay the balance. The condition in respect of this as stated in the telex offer is clear and simple and the appellant had accepted it. For that reason the appellant failed to fulfil the first condition.

As to the second condition, it is clear to us that the allotment of shares worth RM100,000 in Dindings Soya and Multifeed Sdn Bhd to the deceased or their nominees was also never fulfilled. The telex offer stated that the allotment should be completed by or before 15 February 1979. Not only did the appellant fail to allot the said shares, the appellant did not adduce any evidence of the allotment or any attempt to allot the shares within that stipulated period and in fact never did until today. As such we find that the appellant failed to fulfil the second condition.

As to the third condition imposed in the telex offer, it is clear to us that the appellant had accepted this. The only thing left for the parties to do was to implement it by demarcating it on the land title or by a separate agreement. From the record, it is clear to us that this was the sore point between the parties when they negotiated for a written agreement. From the evidence, there was more or less an admission by the appellant that the appellant was not willing to give a right of way as wide as in the telex offer and at the place where the respondents had requested it to be. The reason why the appellant was not willing to accommodate this condition was that the right of way would cut through the appellant's land and this was not good for the appellant in terms of security. Further, it was said that the width of 66 feet for the right of way was too wide. From this, it is clear to us that the appellant had gone back on its words of the unconditional acceptance of the offer. The learned counsel stressed that this was one of the reasons why the respondents refused to execute the proposed agreement. From the evidence it is clear to us that the appellant also failed to fulfil this condition. It was pointed out to us by learned counsel for the respondents that this condition was important to the respondents in order to have access to the respondents' other three pieces of land.

From the evidence, the appellant not only failed to fulfil any one of the conditions but all the conditions imposed even though in their acceptance letter they accepted all the conditions. For that reason, we are of the view that the respondents had every right to treat that there was no valid contract between the parties when the appellant failed to fulfil the conditions in the telex offer.

It was submitted by the learned counsel for the appellant that with the acceptance letter dated 15 January 1979 and the deposit of RM47,000, which receipt was acknowledged by the respondents' solicitors, there existed a valid contract. Evidence was adduced that the cheque was sent to the deceased but the deceased returned the same to their solicitors, Messrs Ngan & Tan, with instructions that the cheque was to be returned to the appellant on the ground that the offer had been rescinded by the renegotiation. According to the evidence, the cheque remained with Messrs Ngan & Tan. Learned counsel for the appellant further submitted that since there was a valid contract, the only thing left for the parties was the execution of a formal contract. In other words, what the learned counsel

meant was that the contract was subject to a formal contract. With the greatest respect to the learned counsel for the appellant, upon perusing the offer dated 12 January 1979 and the acceptance dated 15 January 1979, it was not so. It is clear to us that the offer and the acceptance was a contract for which the parties must fulfil the conditions. There was no stipulation of a separate agreement. The appellant made it very clear that they accepted, the offer unconditionally. The only thing the appellant had to do was to fulfil the conditions to validate the contract. This the appellant failed to do. As we have pointed out earlier, there was no necessity for an agreement as the right of way could be demarcated in the title deed itself.

From the abovestated reasons, we agree with the learned trial judge that there was no valid contract between the parties upon which the appellant could claim for, as stated in the amended statement of claim. We are unanimous that the appeal should be dismissed with costs. The deposit to the respondents to account of taxed costs.

There is still the question of RM47,000 paid by the appellant as earnest money. It is clear from the evidence that the cheque was never returned to the appellant. Since Messrs Ngan & Tan is not a party to this suit, we cannot make any order against them. We hope the present solicitors for the appellant be able to help in tracing the whereabouts of the money and return the same to the appellant.

Appeal dismissed.

Reported by Jafisah Jaafar